

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
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Annual Assessment of the Status of ) CS Docket No. 95-61  
Competition in the Market for the )  
Delivery of Video Programming ) DOCKET FILE COPY ORIGINAL

**REPLY COMMENTS OF THE STATE OF HAWAII**

The State of Hawaii ("State"), by its attorneys, hereby replies to the comments filed on June 30, 1995, in response to the Commission's Notice of Inquiry ("NOI") in the above-captioned proceeding.<sup>1</sup>

**I. SUMMARY**

The NOI seeks, and the comments provide, input on a wide range of issues concerning the provision of multichannel video programming services. The State is concerned with a number of these issues, such as horizontal concentration in the cable television industry. However, the State submits these reply comments to discuss a single item. The NOI and several commenting parties state directly, or imply, that Direct Broadcast Satellite ("DBS") service is available nationally. This is not the case. DBS service is not available in Hawaii. Moreover,

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<sup>1</sup> Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry, CS Docket No. 95-61, FCC 95-186 (released May 24, 1995) [hereinafter "NOI"]. These reply comments are filed by the State through its Department of Commerce and Consumer Affairs. A division of the Department -- the Cable Television Division -- is the State's cable franchise administrator.

according to the best information available to the State, DBS service will not become available in Hawaii in the foreseeable future.

These facts must be incorporated into the *1995 Competition Report* which will grow out the NOI if that *Report* is to accurately portray the state of competition. Also, to the extent the Commission relies on, or encourages Congress to rely on, the *1995 Competition Report* as guidance for future policy decisions, the Commission should reaffirm in the *Report* its previously stated goal of bringing DBS to Hawaii. At a minimum, the Commission should commit itself to reexamining within the next twelve months the feasibility of requiring DBS providers to serve Hawaii.

## II. DISCUSSION

The NOI states that "[s]ince the *1994 Competition Report*, DBS has become available nationwide."<sup>2</sup> Similarly, the NOI asks how video programming markets should be defined in light of DBS's nationwide operations and whether the "prices for DBS services [are] nationally uniform."<sup>3</sup> These statements indicate that the Commission has failed to closely monitor the actual roll-out of DBS, including the decision of DBS providers to omit Hawaii from their current coverage plans. As the Commission correctly notes, DIRECTV, USSB, and Primestar provide multichannel programming comparable to cable programming to numerous

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<sup>2</sup> Id. ¶ 75.

<sup>3</sup> Id. ¶¶ 20 & 40.

subscribers. EchoStar also intends to launch its DBS satellite this year.<sup>4</sup> However, none of the operational systems serves Hawaii.

Advertisements for DBS services do regularly appear on Hawaii citizens' television screens as part of national advertising campaigns. But, time and again, the State's Department of Commerce and Consumer Affairs has had to explain to those who have been frustrated in their attempts to acquire DBS service that the service simply is unavailable. In addition, from what the State has been able to ascertain, none of the DBS entities intends to provide service to Hawaii at any time in the foreseeable future.

The comments filed in response to the NOI further the misimpression that DBS service is available nationally. DIRECTV, Inc. states that it is providing service at uniform rates "nationwide."<sup>5</sup> The National Cable Television Association, Inc. asserts that cable prices are constrained by, among other things, the "nationwide" presence of DBS.<sup>6</sup> Time Warner Cable also asserts, mistakenly, that DBS firms "enjoy a nationwide footprint" and "have rolled out their services nationwide."<sup>7</sup>

The State, to say the least, finds it disturbing that the NOI and the comments overlook the sizeable gap in DBS service. This matter is not at all new to the Commission or to multichannel video providers. The Commission faced this precise issue in MM Docket No.

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<sup>4</sup> Id. ¶ 39.

<sup>5</sup> Comments of DIRECTV, Inc., CS Docket No. 95-61, at 1 & 7 (filed June 30, 1995).

<sup>6</sup> Comments of the National Cable Television Association, Inc., CS Docket No. 95-61, at 28 (filed June 30, 1995); see also id. at Appendix A (a self-described analysis of effective competition which repeatedly misstates that DBS is present in all markets).

<sup>7</sup> Comments of Time Warner Cable, CS Docket No. 95-61, at 7 & 15 (filed June 30, 1995).

89-355. There, the State urged the Commission to mandate true nationwide DBS coverage. The State noted that failure to do so would set a dangerous precedent, in that the Commission never had previously allowed domestic satellite systems to serve only a portion of the United States.

In its Report and Order, the Commission responded that it "is determined to ensure that DBS service is provided throughout the country, including Alaska and Hawaii."<sup>8</sup> However, the agency declined to impose a nationwide coverage requirement on DBS providers, claiming that "it would be premature to now establish specific service requirements for Alaska and Hawaii. . ."<sup>9</sup> Instead, the Commission concluded that, "should it appear, as DBS develops, that Alaska and Hawaii will not be adequately served, we will not hesitate to revisit this issue. . ."<sup>10</sup> The State is particularly disappointed with the Commission's NOI because, in making its over-broad generalizations about the "national" availability of DBS, the Commission has ignored these prior commitments.

The Commission should correct these oversights by highlighting Hawaii's lack of DBS service in the *1995 Competition Report*. The Commission also should outline possible options for bringing DBS service to Hawaii. As the Commission has noted, the *Report* presents an opportunity to assess the development of competition in the provision of video programming and to determine what further actions are necessary to promote competition.<sup>11</sup> Reviewing Hawaii's DBS options also would be consistent with the Commission's reporting requirement,

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<sup>8</sup> Uses of Orbital Allocations in the Direct Broadcast Satellite Service, 6 FCC Rcd 2581, 2582 (1991) [hereinafter "DBS Orbital Allocations"].

<sup>9</sup> Id.

<sup>10</sup> Id. at 2583.

<sup>11</sup> NOI ¶ 4.

which stems from a section of the Communications Act aimed at "increasing competition and diversity in the multichannel video programming market . . . and spur[ring] the development of communications technologies." <sup>12</sup>

At a minimum, the Commission should commit itself in the *Report* to conducting in the next twelve months (i.e., prior to the submission of the *1996 Competition Report*) a reexamination of the factors which discouraged it from imposing a 50-state requirement on DBS providers in 1991. In that earlier decision, the Commission opted not to require service to Hawaii based on the preliminary stage of DBS development. It found "industry plans insufficiently crystallized to permit [it] to determine whether there is a need to mandate specific service requirements for [Hawaii]." <sup>13</sup> The Commission also expressed the hope that DBS entities voluntarily would choose to serve Hawaii. The Commission suggested "it appears likely that service to . . . Hawaii will evolve on its own." <sup>14</sup>

More than four years have passed since the Commission declined to require 50-state DBS coverage. In that time, DBS has matured significantly. The plans of DBS entities are more crystallized. Yet, those plans still do not include providing service to Hawaii. The direction of DBS technology also has become more certain. At the time of the Commission's Report and Order, the uncertainties surrounding the future of DBS technology added to the Commission's reluctance to impose a 50-state service requirement. For example, the Commission suggested, but could not conclude, that digital technology would reduce costs to the

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<sup>12</sup> 47 U.S.C. § 548(a).

<sup>13</sup> DBS Orbital Allocations at 2582.

<sup>14</sup> Id. at 2583.

point where DBS coverage easily could be devoted to Hawaii (because digital modulation would reduce interference potential to neighboring countries and simultaneously increase channel capacity).<sup>15</sup> With a digital DBS system operating in space, the time is now ripe to assess the impact of digital modulation on the feasibility of serving Hawaii.

Indeed, it is conceivable that, if the Commission does not reexamine these issues now, Hawaii might not see DBS service until well into the next century. Without Commission action at this point, DBS entities could end up developing their first generation satellites without considering Hawaii at all, potentially delaying service to Hawaii for another ten to 15 years.

### **III. CONCLUSION**

For the foregoing reasons, the State of Hawaii urges the Commission to specify in its *1995 Competition Report* that Hawaii currently does not receive Direct Broadcast Satellite service; that, according to current DBS roll-out plans, Hawaii is unlikely to receive such service

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<sup>15</sup> Id. at 2582-83.

in the near term; and that, to remedy the situation, the Commission at least intends to re-examine before submitting its *1996 Competition Report* the feasibility of requiring DBS providers to serve the State.


Respectfully submitted,

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